STATE OF MICHIGAN

COURT OF APPEALS

STEEL ASSOCIATES, INC., Plaintiff-Appellee,	UNPUBLISHED October 18, 2005
v	No. 254025 Wayne Circuit Court
CITY OF DETROIT, Defendant-Appellant.	LC No. 02-223249-CC

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

Defendant, City of Detroit ("the city"), appeals as of right from a judgment, entered after a jury trial, awarding plaintiff $4 million, plus interest, costs, and case evaluation sanctions, in this inverse condemnation action. Plaintiff cross appeals the trial court's denial of its request for prevailing party attorney fees. We affirm.

This case involves the inverse condemnation of plaintiff's leasehold interest in property located adjacent to the Detroit City Airport ("the airport"). This Court has previously considered two similar actions brought by companies closely related to plaintiff. See *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116; 680 NW2d 485 (2004) ("*Merkur I*"), wherein this Court affirmed a jury verdict for the plaintiff. See also *HRT Enterprises v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2005 (Docket No. 252858), wherein this Court affirmed in part and reversed in part the trial court's dismissal of another inverse condemnation action.

On appeal, the city first argues that it was entitled to a directed verdict or judgment notwithstanding the verdict (JNOV) on plaintiff's inverse condemnation claim because it did not intend to diminish the value of plaintiff's property interest or create blight in the surrounding area, but was merely exercising its right to plan for airport expansion, leaving open the option of abandoning the project if it became too expensive or funding became unavailable. The city also argues that plaintiff did not have a compensable property interest. We disagree.

This Court reviews a trial court's decision on a motion for a directed verdict or JNOV de novo. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). In reviewing a trial court's decision, "[t]he appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party" to determine whether a question of fact existed. *Id.*

"Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted." *Id.* In other words,

> [i]f reasonable jurors could honestly have reached different conclusions, the motion should . . . [be] denied. If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury. [*Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986).]

"What governmental action constitutes a 'taking' is not narrowly construed, nor does it require an actual physical invasion of the property." *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property. *Charles Murphy, MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993); *Hinojosa*, *supra* at 548. A plaintiff alleging inverse condemnation must prove a causal connection between the government's action and the alleged damages. *Id*. The plaintiff "must prove 'that the government's actions were a *substantial* cause of the decline of his property's value' and also 'establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property.'" *Id*., quoting *Heinrich v Detroit*, 90 Mich App 692, 700; 282 NW2d 448 (1979); see also *Merkur I*, *supra* at 130.

Contrary to what the city argues, plaintiff's leasehold interest is a compensable property interest. As noted in *Merkur I*, *supra* at 134, an action may be maintained to recover damages for the inverse condemnation of a leasehold interest in property. See also *In re Acquisition of Billboard Leases & Easements*, 205 Mich App 659, 661-662; 517 NW2d 872 (1994). In this case, plaintiff submitted evidence that the city took affirmative acts that interfered with plaintiff's ability to do business under its lease. In particular, plaintiff's proofs at trial showed that the city had been announcing its intent to take the property since approximately 1989. The city accepted grant money from the Federal Aviation Administration ("FAA") and promised to use the money to buy properties in the area, including plaintiff's property. The city acquired some properties, demolished structures, and announced the "temporary" closing of McNichols Road, which, at the time of trial in 2003, had remained "temporarily" closed since 1987. The city also allowed the neighborhood to deteriorate, diminished city services to the area, and even used one of its properties as a tire dump.

In 1990, the city approved plans to construct a new building at the front of plaintiff's property, but the city airport department then wrote a letter to the FAA strongly objecting to the proposed construction, and arguing that it would constitute a hazard to air navigation. Although the FAA issued a no-hazard determination in January 1991, it reversed itself in August 1992, four months after the city filed a revised airport layout plan showing a proposed new runway going through the property. The city then refused to issue a building permit.

In 1997, two of plaintiff's owners, Hein Rusen and Karl Thomas, made inquiries concerning the possibility of constructing a new building at the rear of the property, but the city failed to respond. In 1999, the FAA issued a determination that the proposed building posed a hazard to air navigation. The Michigan Aeronautic Commission ("MAC") then issued a conditional tall structure permit stating that, if the property was taken for airport expansion,

Thomas and Rusen would not be reimbursed for the new building or any business associated with it.

The city filed another updated airport layout plan with the FAA in 2000, again showing a proposed new runway going through plaintiff's property. Thomas and Rusen then attempted to secure permission to update the existing building to accommodate the larger equipment needed by plaintiff. The FAA found that the modifications did not significantly alter the existing building, and issued a no-hazard determination. The MAC again issued a conditional tall structure permit, however, which provided that, if the property were taken for airport expansion, Thomas and Rusen would not be reimbursed by the state or the federal government for the modified building or any business associated with it.

Plaintiff's evidence showed that, between 1992 and 2003, because of its inability to modernize, the value of its business diminished substantially, to the point where it was not making a profit at all. Viewed most favorably to plaintiff, the evidence showed that if Thomas and Rusen had been permitted to construct a new building or update the old building, plaintiff's lessee—Merkur Steel Supply—would have installed larger slitters and cranes, which it would have leased to plaintiff, which would have allowed plaintiff to process larger coils of steel as demanded by the state of the art for the industry, thereby allowing plaintiff's business to increase rather than decrease. Given the substantial evidence of the history of these businesses and the fact that they were owned and operated by Thomas and Rusen, plaintiff's proofs were not speculative.

In sum, the evidence was sufficient to enable the jury to find, as it did, that the city engaged in affirmative actions, directed at plaintiff's property, which was a substantial cause of plaintiff essentially going out of business. The trial court did not err in denying the city's motions for a directed verdict or JNOV.

The city next argues that plaintiff violated MCR 2.203(A) by failing to join all of its claims in one action, that being the related case of *Merkur I*. We disagree.

MCR 2.203(A) states:

> In a pleading that states a claim against an opposing party, *the pleader* must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. [Emphasis added.]

The construction and application of a court rule is a question of law that is reviewed de novo. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 133; 624 NW2d 197 (2000).

Although the city argues that plaintiff violated this court rule, it fails to address the fact that plaintiff is a separate, distinct corporation from the plaintiff in *Merkur I*. Although *Merkur I* and this case arise from the same set of facts, the "pleader" in *Merkur I* only brought the claims that *it* had against the city arising from those facts. Plaintiff, the "pleader" in this case, has

brought its own, distinct claims. The city has failed to show that plaintiff violated MCR 2.203(A).

The city also argues that plaintiff's claims are barred by res judicata and collateral estoppel, again relying on *Merkur* I. We disagree.

The applicability of the doctrine of res judicata is a question of law to be reviewed de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). When reviewing a decision whether to dismiss on the basis of res judicata or collateral estoppel, this Court is to accept all well pleaded allegations as true and construe them in favor of the nonmoving party; dismissal is proper only when no factual development could provide a basis for recovery. *Grazia v Sanchez*, 199 Mich App 582, 583-584; 502 NW2d 751 (1993). Judicial estoppel is an equitable doctrine and, therefore, that issue is also reviewed de novo, although the findings of fact supporting the decision are reviewed for clear error. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

"'For collateral estoppel to apply, a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment. In addition, the same parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel.'" *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988). In the present case, the city has consistently maintained that there is no mutuality of estoppel (otherwise, the city would be bound by the determinations made against it in *Merkur I*). Thus, the city's collateral estoppel argument is internally inconsistent and must be rejected.

Res judicata, on the other hand, bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Ozark v Kais*, 184 Mich App 302, 307; 457 NW2d 145 (1990). The doctrine of res judicata requires a showing that: (1) the prior action was decided on the merits, (2) there was a final decision entered in the prior action, (3) the matter contested in the second case was or could have been resolved in the first case, and (4) the two actions involve the same parties or their privies. *Id*. at 307-308; see also *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994). Here, the first and second prongs of this test are not disputed.

Privity, the fourth prong, "has been defined as 'mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.'" *Sloan v Madison Heights*, 425 Mich 288, 295; 389 NW2d 418 (1986), quoting *Petersen v Fee Int'l, Ltd*, 435 F Supp 938, 942 (WD Okla, 1975); see also *Phinisee v Rogers*, 229 Mich App 547, 553; 582 NW2d 852 (1998). "Privity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.'" *Id.* at 553-554, quoting *SOV v Colorado*, 914 P2d 355, 360 (Colo, 1996), itself quoting *Public Service Co v Osmose Wood Preserving, Inc*, 813 P2d 785, 787 (Colo App, 1991).

In the present case, plaintiff is a subsidiary of Merkur, Inc., while Merkur Steel Supply ("Merkur") is a division of Merkur, Inc. Thomas and Rusen own Merkur, and have always had

at least a partial ownership interest in plaintiff. Nonetheless, plaintiff and Merkur are clearly distinct companies engaged in different phases of the steel industry. Both plaintiff and Merkur had an interest in the construction of a new building or the modification of the existing building, because both would have benefited from being able to modernize in order to handle additional business, particularly larger coils of steel. In *Merkur I*, however, Merkur did not represent or protect plaintiff's independent interests.

Rather, it is undisputed that, in *Merkur I*, the city objected to the submission of any evidence of *plaintiff*'s damages to the jury and, therefore, Merkur was only permitted to argue (and recover) damages that *it* sustained by reason of its temporary partial ownership of plaintiff. Thus, the present claims could not have been litigated in *Merkur I* because the city successfully foreclosed litigation of those claims.[1] While Merkur could have cross-appealed that issue, as the city now argues, the fact remains that the *Merkur I* trial was concluded without plaintiff's rights being presented and protected. Plaintiff argues that, in light of the city's position in *Merkur I*, the city should be judicially estopped from now arguing that plaintiff's claims could have been litigated in *Merkur I*. We agree.

"[J]udicial estoppel is widely viewed as a tool to be used by courts in impeding those litigants who would otherwise play 'fast and loose' with the legal system." *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994). In *Paschke*, the Supreme Court adopted the "'prior success' model of judicial estoppel," explaining:

> Under this doctrine, a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. [*Id.* at 509, quoting *Lichon v American Universal Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990).]

"Under the 'prior success' model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true." *Paschke*, *supra* at 510. "Further, in order for judicial estoppel to apply, the claims must be wholly inconsistent." *Id.*

In *Merkur I*, the city admittedly objected to the presentation and recovery of any damages sustained by plaintiff, and argued that only those damages sustained by Merkur as a direct consequence of its ownership interest in City Steel could be presented. The trial court agreed with the city's position. Thus, the city's position in the present case—that plaintiff's claims are barred because they could have been asserted in *Merkur I*—is inconsistent with its position in *Merkur I*. To accept the city's position now would result in a miscarriage of justice because plaintiff would be deprived of any opportunity to recover the rest of its damages. We therefore conclude that, even if there is privity between plaintiff and Merkur, the city is judicially estopped from advancing its res judicata/collateral estoppel argument against plaintiff in this case.

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[1] The city does not dispute that, in the present action, plaintiff did not attempt to recover damages already recovered by Merkur in *Merkur I*.

The city next argues that because plaintiff did not "personally" apply for an FAA hazard determination or an MAC tall structures permit, the trial court erroneously denied its pretrial motion for summary disposition and its postjudgment motion for a new trial or JNOV. We disagree.

A trial court's decision on a motion for summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). A new trial may be granted for, inter alia, an error of law. MCR 2.611(A)(1)(g). However, a trial court's decision granting or denying a motion for a new trial will not be reversed absent a palpable abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997); *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997).

It is undisputed that plaintiff itself did not apply for either a building permit, an MAC tall structures permit, or an FAA hazard determination. Plaintiff's theory, however, was that it independently sustained damages because the city did not allow Thomas and Rusen, through Merkur, to build an additional structure on the property, or to modify the existing structure, thereby preventing plaintiff from being able to process larger coils of steel and eventually causing plaintiff to become unprofitable. As this Court found in *Merkur I, supra* at 126-127, a claim of inverse condemnation is based on the totality of the circumstances that contribute to a plaintiff's damages. Plaintiff showed that the city took affirmative action directed at the property, and there was ample evidence of the adverse financial impact that the city's actions had on plaintiff. The fact that plaintiff did not "personally" apply for these permits was not material because it was clear from the evidence that the city was not going to permit any new construction or remodeling on the property. The law does not require the doing of a futile or useless act. *Miller Bros v Dep't of Natural Resources*, 203 Mich App 674, 681; 513 NW2d 217 (1994).

The city also argues that plaintiff improperly segmented its claims. We disagree. The record does not disclose that the city raised this issue below. Unpreserved issues are forfeited unless the appellant can show a plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

As conceded by the city, this Court in *Merkur I*, *supra* at 132-134, rejected the city's argument that Merkur had been improperly allowed to segment its claims concerning different parcels of the property. This Court found that anti-segmentation cases arise in the context of regulatory takings, whereas *Merkur I* "involve[d] a leasehold estate." *Id*. at 133. Similarly, in the present case, plaintiff alleged a partial de facto taking of a leasehold interest, not a regulatory taking. Therefore, the anti-segmentation cases cited by the city are inapplicable. There was no plain error.

The city also claims that plaintiff's evidence of damages was unduly speculative. We disagree.

The federal and state constitutions forbid the government from taking private property "without just compensation." US Const, Am V; Const 1963, art 10, § 2. "The purpose of just

compensation is to put property owners in as good a position as they would have been had their property not been taken from them." *Miller Bros, supra* at 685; see also *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 543; 481 NW2d 762 (1992). "The public must not be enriched at the property owner's expense . . . . [b]ut neither should property owners be enriched at the public's expense." *Miller Bros*, *supra* at 685. To prevent either party from being unjustly enriched, the nature of the taking must be considered, as well as any other relevant factors. *Id*. at 685-686, 689.

"There is no formula or artificial measure of damages applicable to all condemnation cases." *Poirier*, *supra* at 543, quoting *Jack Loeks Theatres, Inc v Kentwood*, 189 Mich App 603, 608; 474 NW2d 140 (1991), vac in part 439 Mich 968 (1992). Rather, "[t]he amount to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented." *Jack Loeks Theatres*, *supra* at 608. Nonetheless, "[d]amages will not be allowed in a condemnation case unless they can be proven with reasonable certainty." *Merkur I*, *supra* at 135, quoting *Co of Muskegon v Bakale*, 103 Mich App 464, 468; 303 NW2d 29 (1981). Thus, while "[t]he loss of speculative profits" is not compensable, courts must "allow a property owner to present evidence of 'the most profitable and advantageous use it could make of the land' even if the use was still in the planning stages and had not been executed." *Id*. at 135, quoting *Co of Muskegon*, *supra* at 468, and *Village of Ecorse v Toledo, C S & D R Co*, 213 Mich 445, 447; 182 NW 138 (1921).

Where there has been a permanent taking, the fair market value of the land is often appropriate compensation. *Miller Bros*, *supra* at 686. For a temporary taking, there are "five basic rules for measuring damages[:] . . . rental return, option price, interest on lost profit, before-after valuation, and benefit to the government." *Poirier*, *supra* at 543-544; see also *Miller Bros*, *supra* at 687-688 (fair market rental value). As the Arizona Supreme Court explained:

> Each of these damage measures works well in some "taking" cases and inequitably, if at all, in others. This is because no one rule adequately fits each of the many factual situations that may be present in a particular case. Such problems as: whether the losses are speculative; when the taking actually occurred; whether it caused any damage; and whether it was an acquisitory or nonacquisitory setting combine to make each measure of damages, in some cases, a "guessing game" between too little compensation on the one hand and providing a windfall on the other.
>
> Recognizing this problem, we feel the best approach is not to require the application of any particular damage rule to all temporary taking cases. Instead we hold that the proper measure of damages in a particular case is an issue to be decided on the facts of each individual case. It is our intent to compensate a person for the losses he has actually suffered by virtue of the taking. Either the parties may agree to an appropriate damage measure or each may present evidence as to the actual damages in the case and its correct method of determination. The damages awarded and the way to measure those damages thus may be adapted to compensate the party whose land has been taken for his actual losses.

> We emphasize, however, that no matter what measure of damages is appropriate in a given case, the award must only be for *actual damages*. Such actual damages must be provable to a reasonable certainty similar to common law tort damages. See *Carey v Piphus*, 435 US 247; 98 S Ct 1042; 55 L Ed 2d 252 (1978). This approach will compensate for losses actually suffered while avoiding the threat of windfalls to plaintiffs at the expense of substantial government liability. Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark L R at 637-39; *City of Austin v Teague*, 570 SW2d [389, 395 (Tex, 1978)]. [*Poirier*, *supra* at 544-545, quoting *Corrigan v Scottsdale*, 149 Ariz 538, 543-544; 720 P2d 513 (1986) (emphasis in the original).]

Thus, the "best approach" to determining what constitutes just compensation in a given case is a "flexible approach." *Poirier*, *supra* at 545.

In the present case, plaintiff introduced testimony concerning its business dealings, income, profits, the fees paid to the various owners, and the effect of the city's actions on its ability to turn a profit. Plaintiff introduced evidence that, to recreate the average stream of income produced by plaintiff—approximately $200,000 a year over the last ten years—one would need to invest approximately $4.1 million. The jury awarded plaintiff $4 million. We believe that plaintiff's evidence of damages was not unduly speculative, and created a question of fact for the jury. The trial court did not err in denying the city's motion for JNOV or a new trial on this issue.

For its next claim of error, the city argues that the trial court erred by giving plaintiff's supplemental jury instructions 4, 5 and 11, and by failing to give jury instructions proposed by the city. However, the city does not identify or quote its proposed instructions that the trial court allegedly failed to give, nor does it quote plaintiff's proposed instructions or address the content of any of the instructions. The city's conclusory argument that plaintiff's proposed instructions were contrary to law, and that its instructions should have been given instead, is insufficient to properly present this issue for our review. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger*, *supra* at 178. Therefore, we conclude that this issue has been abandoned. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

The city also argues that it was deprived of a fair trial because of evidentiary error. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Preliminary issues of admissibility are reviewed de novo, but it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id*. at 332.

Plaintiff's exhibit 111, which contained an estimate of the cost of acquiring plaintiff's property, was relevant to the city's motives for delaying acquisition of the property. We find no merit to the city's claim that the estimate was unduly prejudicial under MRE 403 such that it deprived the city of a fair trial.

The city's argument regarding financial documents of plaintiff's related corporations does not present an evidentiary question. Rather, the record discloses that after jury selection was completed, the city issued a subpoena duces tecum requiring Thomas to produce "substantial financial records" concerning plaintiff and its affiliated companies. Plaintiff objected on the ground that discovery had closed nine months earlier, and asked the trial court to quash the subpoena. The trial court ordered plaintiff to produce its annual financial statements at trial, but otherwise agreed with plaintiff and quashed the subpoena. Where an issue is not separately raised and argued, it is not properly before this Court, and will not be considered. See MCR 7.212(C)(5); see also *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). In any event, the city has failed to show that the trial court abused its discretion in quashing what was essentially a discovery subpoena, issued eight months after the close of discovery.

Regarding plaintiff's exhibits 92 and 102, the city fails to describe the exhibits or their contents, and simply argues that, under MRE 403, they should not have been admitted. The city adds that the erroneous admission of these exhibits severely prejudiced it and entitles it to a new trial. As previously stated, "[a] party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger*, *supra* at 178. Therefore, we deem this claim of error abandoned. *Etefia*, *supra* at 471.

The city also argues that plaintiff's counsel made improper comments during his opening statement and closing argument that inflamed the jury and deprived it of a fair trial. Because the city did not object to the challenged comments on the grounds urged on appeal, this claim of error is unpreserved. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). A review of the record fails to disclose support for the city's argument that plaintiff's counsel improperly accused the city "of engaging in some type of nefarious scam." He merely explained to the jury what he intended to prove. Counsel's opening statements did not constitute plain error resulting in prejudice.

Similarly, during closing argument, counsel merely pointed out that plaintiff's owners, Thomas and Rusen, had visibly aged since their 1986 or 1987 photographs published in a company brochure, attributing that partially to stress caused by this case. However, jurors were able to evaluate those remarks in light of their general knowledge that people age with time, with or without stress. *People v Schmidt*, 196 Mich App 104, 108; 492 NW2d 509 (1992); see also CJI2d 3.5(9). The remark did not constitute plain error resulting in prejudice.

Next, the city argues that the jury's verdict is against the great weight of the evidence. We disagree.

The city merely asserts that the jury's verdict is against the great weight of the evidence when the evidence is "assessed with a critical eye." The city fails to identify the proper test for assessing whether a verdict is against the great weight of the evidence. See *People v Lemmon*, 456 Mich 625, 635, 642, 647; 576 NW2d 129 (1998). More importantly, the city fails to engage in any analysis of the proofs presented below. As previously stated, "[a] party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger*, *supra* at 178. Therefore, this issue is also deemed abandoned. *Etefia*, *supra* at 471.

On cross appeal, plaintiff argues that because a prevailing claimant in an action under the Uniform Condemnation Procedures Act ("UCPA"), MCL 213.51 *et seq.*, is entitled to attorney fees under that act, the trial court's denial of its motion for prevailing party attorney fees in this case is a violation of equal protection because it fails to treat similarly situated parties similarly. We disagree.

Constitutional claims are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). Whether a classification violates equal protection guarantees depends on the type of classification involved and on the nature of the interest affected. *In re Pension of 19th District Judges under Dearborn Employees Retirement System*, 213 Mich App 701, 704; 540 NW2d 784 (1995). Plaintiff concedes that the rational basis test applies in this case. *Id*. at 705. Under the rational basis test, the challenged classification must be "rationally related to a legitimate government purpose." *Phillips v Mirac, Inc*, 470 Mich 415, 433; 685 NW2d 174 (2004), quoting *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000).

The rational basis test is a "highly deferential standard of review [that] requires a challenger to show that the legislation is '"arbitrary and wholly unrelated in a rational way to the objective of the statute."'" *Id*. at 433, quoting *Crego*, *supra* at 259, itself quoting *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981). In identifying the purpose or objective of the legislation, courts "look to 'any set of facts, either known or that could reasonably be assumed, even if such facts may be debatable.'" *Phillips*, *supra* at 435, quoting *Harvey v Michigan*, 469 Mich 1, 7; 664 NW2d 767 (2003). The rational basis test does not consider the effects of the legislation, nor its "wisdom, need, or appropriateness." *Id*. at 434-435, quoting *Crego*, *supra* at 260.

The purpose of the UCPA is to "protect a property owner and save him whole in condemnation proceedings which are instituted against his property and which he must defend at his peril." *Escanaba & Lake Superior RR Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 814-815; 402 NW2d 505 (1986), quoting *In re Kent Co Airport*, 368 Mich 678, 685-686; 118 NW2d 824 (1962). In other words, "[t]he legislative intent behind the [UCPA] . . . is to 'place the owner of the property in as good a position as was occupied before the taking.'" *Detroit v Michael's Prescriptions*, 143 Mich App 808, 811; 373 NW2d 219 (1985). The provisions allowing for attorney fees in a UCPA action "clearly import that the property owner shall not be made to suffer for a proceeding *which he did not initiate* and which is one of the most extraordinary in the law—the taking of private property." *Escanaba & Lake Superior RR Co*, *supra* at 815, quoting *Kent Co Airport*, *supra* at 685-686.

In *Miller Bros*, *supra* at 689-690, this Court stated:

> When the state converts private property for its own use without first paying for it, it is not only acting unconstitutionally, it is also violating the UCPA by acquiring property without complying with that statute's exclusive procedures. However, when the state [e]ffects a taking merely by depriving an owner of all beneficial use of the property, the state does not *acquire* the property "taken." Such a taking may violate the constitution, but it does not violate the UCPA. Consequently, the state cannot be compelled to invoke the UCPA. And if it

> cannot be forced to proceed under the statute, then the UCPA's provision regarding attorney fees is not applicable.

Contrary to plaintiff's argument, it is not situated similarly as a person entitled to proceed under the UCPA because an inverse condemnation "case involves a taking that did not include the actual acquisition of private property." *Id*. at 690; see also MCL 21357(1). While plaintiff may argue that the virtual destruction of its leasehold interest is as worthy of protection as the physical possession of a parcel of land, the wisdom of the statutory distinction is not to be considered by this Court. Thus, we conclude that there is a rational basis for treating persons whose property is "acquired" by the government differently from those who retain the property, but whose ability to fully utilize it is impeded. There is no equal protection violation, and the trial court did not err in denying plaintiff's motion for prevailing party attorney fees on this basis.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette